

SERVED: April 1, 1993

NTSB Order No. EA-3841

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11163
v.)	
)	
DUANE N. HODGKINSON,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, rendered at the conclusion of an evidentiary hearing on February 21, 1991.¹ By that decision, the law judge affirmed an order of the Administrator charging respondent with violations of sections 91.79(c), and 91.9 of the Federal Aviation Regulations ("FAR," 14

¹An excerpt from the hearing transcript containing the initial decision is attached.

C.F.R. Part 91),² and reduced the sanction imposed from a 120-day suspension of respondent's commercial pilot certificate to one of 30 days.³ The Administrator's complaint arose from respondent's alleged operation of a Cessna 172 aircraft, N6470E, on two separate occasions, over a sparsely populated area within 500 feet of persons and structures on the ground.

An aerial photographer hired respondent to transport him over private residences for the purpose of photographing several homes and their surrounding property.⁴ On July 25, 1989, respondent and his passenger flew in the vicinity of Rocky Canyon, south of Livingston, Montana. Two area residents, a Mr. and Mrs. Juvan, were in their yard when respondent allegedly operated the aircraft near their property. Mr. Juvan testified

²Sections 91.79(c) and 91.9 (now 91.119(c) and 91.13, respectively) read as follows:

"§ 91.79 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * *

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator did not appeal the reduction in sanction.

⁴The photographer hoped to sell the unsolicited photographs to the property owners.

that he used the height of nearby power lines as a gauge to estimate that the aircraft was between 200 and 300 feet above ground level (AGL) and between 200 and 300 feet from his house. He wrote down the aircraft's identification number and reported the incident to the local sheriff's office.

On July 26, 1989, respondent again acted as pilot-in-command of N6470E with the same passenger, this time through Paradise Valley in South Park County, Montana. They overflowed the home of a Mr. Rizzotto, who also testified at the hearing. Mr. Rizzotto stated that he was standing on his front porch when he saw aircraft N6470E flying about 100 to 125 feet AGL at an approximate lateral distance of 175 to 200 feet from his house.⁵

He noticed that the door on the right side of the aircraft had been removed and the passenger was taking pictures.⁶ Although he ultimately utilized binoculars to observe the aircraft, Mr. Rizzotto testified that he read the identification numbers without the aid of binoculars. Transcript (Tr.) at 75. He too called the local sheriff's department and reported the incident.

The photographer testified that the aircraft flew between 500 and 700 feet of the Rizzotto home. He also stated that he did not photograph the Juvan's property, so there was no need for low flight in that instance. Although he could not remember at

⁵He also used utility poles as a gauge to estimate the altitude.

⁶Mr. Rizzotto testified that, several weeks later, some one came to his home and attempted to sell him an aerial photograph of his home.

what altitude the aircraft was when they traversed the area over the Juven's home, he estimated that they were probably 700 feet above the ground. Tr. at 207. According to respondent, the aircraft never descended below 600 feet AGL on either flight.

After consideration of the briefs of the parties and the record below, the Board concludes that, for the reasons that follow, safety in air commerce or air transportation and the public interest require that we affirm the oral initial decision.

In his appeal, respondent contends that the law judge's conclusion was not supported by sufficient evidence. First, respondent alleges that the law judge erroneously relied on Administrator v. Ingham, 3 NTSB 4063 (1981) when deciding that respondent's aircraft was closer than 500 feet from persons or structures on the ground. In Ingham, an FAA aviation inspector testified that he could not read the subject aircraft's registration numbers, which were 12 inches high, when the aircraft was on the ground, stationary, and at a distance of 500 feet.⁷

Respondent argues that, as he testified, the identification numbers on his aircraft were 13 inches high and thus could be read at a distance greater than 500 feet. He also contends that

⁷In the instant case, the law judge referred to Ingham, stating that "it appeared that 12 inch high registration numbers really cannot be seen with the naked eye clearly when you get beyond 500 feet." Tr. at 138. Although Ingham is fact-specific and does not represent a conclusion by the Board that 12-inch high aircraft identification numbers cannot be read at a distance of 500 feet, any reliance by the law judge on this case was harmless.

Mr. Rizzotto, who testified that he has 20/15 vision (better than the standard 20/20), could have read the numbers at a distance greater than 500 feet. In addition, respondent notes that both Mr. Rizzotto and Mr. Juvan testified that the aircraft they saw was red and white. Respondent maintains that his aircraft is brown, white, and yellow. These assertions, however, are not enough to overturn the law judge's credibility assessments.

The testimony of Mr. Rizzotto revealed that he saw respondent's aircraft flying at about 100 to 125 feet AGL, approximately 175 to 200 feet from his house. Mr. Juvan recalled that the aircraft was between 200 and 300 feet from his house. If the law judge believed the statements of these witnesses, as it appears that he did, whether or not the numbers were discernable at a distance greater than 500 feet is irrelevant. They both testified that they read the numbers and reported them to the sheriff's department.⁸

Absent "arbitrariness, capriciousness, or other compelling reasons," we will not disturb a law judge's credibility determination. Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein. See also Administrator v.

⁸Respondent argues that Mr. Juvan did not record the correct identification numbers but, rather, was told the numbers by the sheriff's department when he called to file his complaint. Respondent bases this assertion on a letter of August 15, 1989, to the Flight Standards District Office written by Mrs. Juvan and signed by both Mr. and Mrs. Juvan wherein she identified the aircraft as "870E." Mr. Juvan testified that when he saw the numbers, he wrote them on his hand and soon after related them to the sheriff's office. Copies of his complaint dated 7/25/89 and the Rizzotto complaint dated 7/26/89 were made part of the record.

Richards, 2 NTSB 1160 (1974)(to resolve conflicting testimony, it is unavoidable that a law judge must assess credibility and make the necessary findings of fact).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, is affirmed; and
3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.⁹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).